

No. 8415

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IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT <sup>12</sup>

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E. WAGNER & SON, INC., a corporation,  
*Petitioner,*

VS.

COMMISSIONER OF INTERNAL REVENUE,  
*Respondent.*

---

ON PETITION FOR REVIEW OF DECISION OF THE UNITED  
STATES BOARD OF TAX APPEALS

---

**BRIEF OF PETITIONER**

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PAUL P. O'BRIEN,



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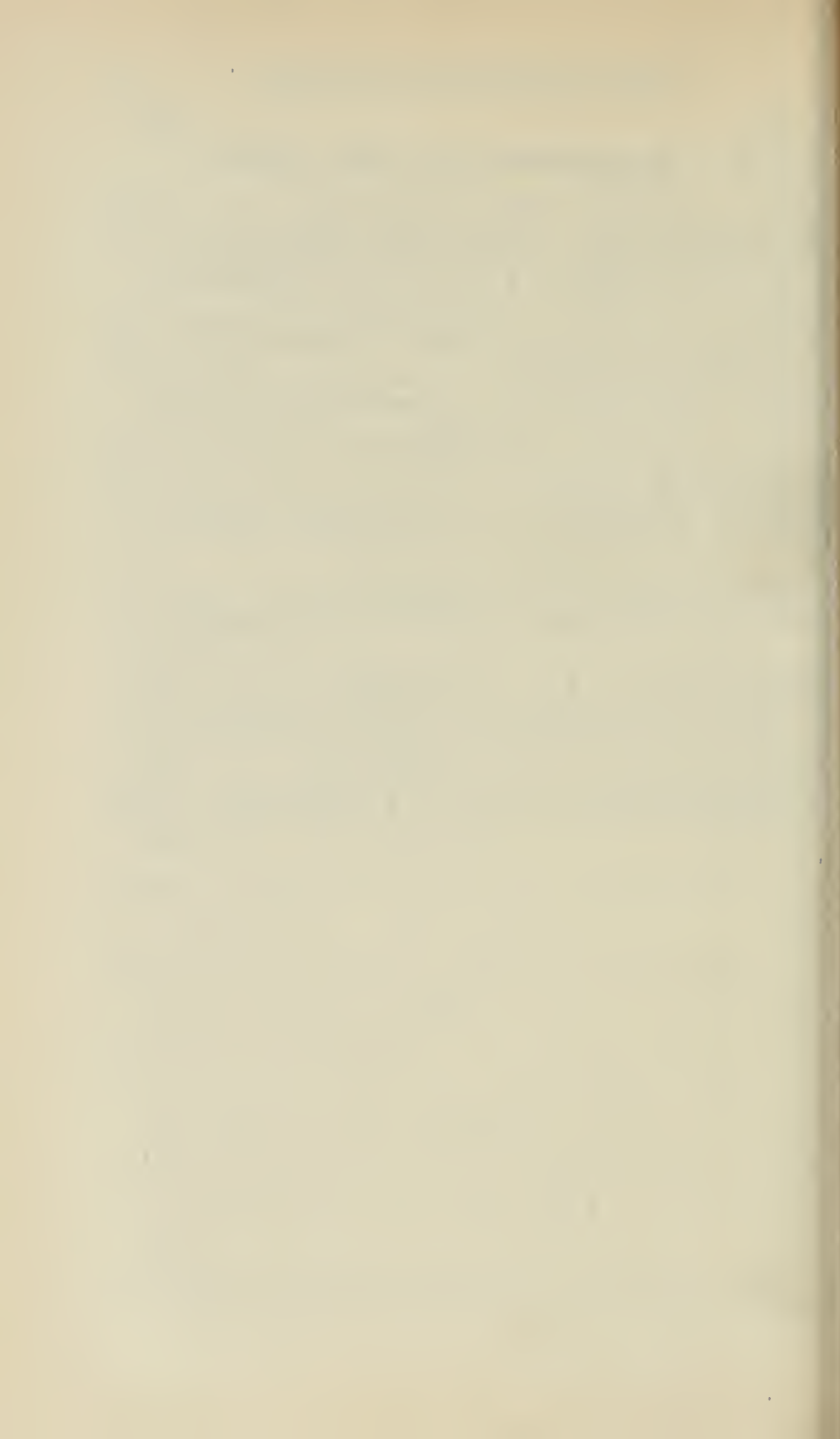
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No. 8415

ON PETITION FOR REVIEW OF DECISION OF THE UNITED  
STATES BOARD OF TAX APPEALS

BRIEF OF PETITIONER

**JURISDICTION**

The controversy involves the proper determination of petitioner's liability for Federal income tax for the calendar year 1929. The petitioner, E. Wagner & Son, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Washington. The income tax return of the said corporation for the taxable year 1929 was duly filed within the time provided therefor, with the Collector of Internal Revenue for the District of Washington, within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit (R. 83). On March 12, 1932, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency in in-

come taxes for the calendar year 1929 in the amount of \$2,670.61 (R. 35, 63).

A petition for redetermination of the deficiency and for a refund of overpayment was filed with the United States Board of Tax Appeals May 7, 1932, in Cause No. 65845 (R. 1, 4), pursuant to the provisions of the Revenue Act of 1926, Sections 1000, 308 and 274, as amended by Section 272, Revenue Acts of 1928 and 1932. The Board redetermined the deficiency in the amount of \$1,333.44 (R. 28).

This appeal is taken from the decision of the United States Board of Tax Appeals promulgated July 6, 1936 (R. 3, 28), and is brought to this court by Petition for Review (R. 29) filed October 5, 1936 (R. 3, 34), pursuant to provisions of the Revenue Act of 1926, Sections 1001-1003, c. 277, 44 Stat. 109-110, as amended by the Revenue Act of 1932, Section 1101, c. 209, 47 Stat. 169, as amended by the Revenue Act of 1934, Section 519, 48 Stat. 760.

## STATEMENT OF THE CASE

This case involves the proper determination of petitioner's liability for Federal income tax for the calendar year 1929.

Mr. E. Wagner was president of the petitioner corporation at all times material to these proceedings (R. 42), and Otto H. Wagner was secretary, treasurer and general manager (R. 41). They were also the trustees (R. 45) and devoted their entire time to the management of its business. These trustees held two meetings during 1929 for the purpose of considering officers' salaries. They decided in June, 1929, that they should receive a salary of \$10,000 each for 1929 and subsequent years (R. 46, 58). At the meeting held in September, 1929, it was decided that they should each receive a bonus of \$3,000 for services performed during 1929 (R. 58). The total sum of \$13,000 for Mr. E. Wagner and a like sum for Otto H. Wagner were reasonable values for personal services rendered by these men during the year 1929. The petitioner claimed a deduction in its income tax return for the calendar year 1929 on account of compensation paid its officers in the amount of \$26,000 (R. 83). The Commissioner of Internal Revenue disallowed \$20,000 of this amount (R. 66). Upon petition for redetermination the Board allowed \$10,000 for Otto H. Wagner and \$4,000 for Mr. E. Wagner (R. 14).

Mr. E. Wagner and Otto H. Wagner made loans to the petitioner prior to and during 1929, and in addition thereto, they left undrawn with the petitioner

part of their salaries and bonuses for the years 1929 and prior thereto (R. 53). Interest on these amounts was deducted by the petitioner in its income tax return for the calendar year 1929 (R. 83). The Commissioner of Internal Revenue allowed interest in the amount of \$2,009.53 during this year on loans made by the corporation from sources other than its officers (R. 39, 40, 41, 65, 83). The Commissioner had allowed interest on loans and undrawn salaries of these officers of the petitioner for years prior to 1929. However, the Commissioner of Internal Revenue disallowed any interest during 1929 on loans, salaries and bonuses left with petitioner during 1929 and prior years by Mr. E. Wagner and Otto H. Wagner. The amount so claimed and disallowed was \$2,750, which was corrected in proof before the Board to \$1,743.73 (at 6% interest, or \$2,906.22 in case 10% interest be allowed) (R. 39, 40, 41, 66, 98). The Board sustained the Commissioner in this disallowance. The Board member who conducted the hearing filed a strong dissenting opinion. One other member also dissented (R. 17 to 28).

The petitioner should be allowed deductions of:

1. \$13,000 salary for Otto H. Wagner, which is \$3,000 more than the Board allowed.
2. \$13,000 salary for Mr. E. Wagner, which is \$9,000 more than the Board allowed.
3. \$1,743.73 (at 6% interest, or \$2,906.22 in case 10% interest be allowed) interest on loans, salary and bonuses left with petitioner by these officers. This was disallowed by the Board.

These deductions will result in a refund to the petitioner in the amount of \$178.37 (with the 6% interest item, or \$306.24 at 10%), rather than a deficiency of \$1,333.44 as determined by the Board.

### NUMERICAL SPECIFICATION OF ERRORS RELIED UPON

The numerical specification of the assigned errors to be relied upon are as follows: (1) (R. 32), (2) (R. 32), (3) (R. 32), (4) (R. 32), (5) (R. 32), (6) (R. 32), (7) (R. 32), (8) (R. 32), (9) (R. 33), (10) (R. 33), (11) (R. 33), (12) (R. 33), (13) (R. 33), (14) (R. 33), (15) (R. 33), (16) (R. 34).

### ARGUMENT

#### A. Salaries Claimed Are Reasonable and Deductible Assignments of Error:

(1) The finding that a reasonable allowance as compensation for services rendered by E. Wagner for the year 1929 was less than \$13,000, is unsupported by any evidence (R. 32).

(2) The finding that a reasonable allowance as compensation for services rendered by Otto H. Wagner for the year 1929 was less than \$13,000 is unsupported by any evidence (R. 32).

(3) The finding that petitioner is not entitled to the deduction from petitioner's gross income for the year 1929, of the sum of \$13,000 for compensation for personal services rendered by E. Wagner, is unsupported by any evidence (R. 32).



(4) The finding that petitioner is not entitled to the deduction from petitioner's gross income for the year 1929 of the sum of \$13,000 for compensation for personal services rendered by Otto H. Wagner, is unsupported by any evidence (R. 32).

(7) The findings of fact are not supported by the evidence (R. 32).

(8) The findings of fact are contrary to the evidence (R. 32).

(10) The failure to allow as a deduction from the petitioner's gross income for the year 1929 the sum of \$13,000 for compensation for personal services rendered by E. Wagner (R. 33).

(11) The failure to allow as a deduction from the petitioner's gross income for the year 1929 the sum of \$13,000 for compensation for personal services rendered by Otto H. Wagner (R. 33).

(12) The failure to determine that the sum of \$13,000 was a reasonable allowance for compensation for personal services of E. Wagner for the year 1929 (R. 33).

(13) The failure to determine that the sum of \$13,000 was a reasonable allowance for compensation for personal services of Otto H. Wagner for the year 1929 (R. 33).

### *1. Duties of Otto H. Wagner*

Otto H. Wagner is the son of Mr. E. Wagner. He was secretary, treasurer and general manager and one of the trustees of the corporation (R. 41, 43).

His duties included cruising timber owned by the State of Washington, making application for its purchase, laying out logging work, cutting timber and bringing the timber into the saw mill (R. 50). He supervised the saw mill and box factory and lumber yard operations at Okanogan. He handled the sales end of the business in Okanogan County (R. 50).

## *2. Duties of Mr. E. Wagner*

Mr. E. Wagner was the real "brains" of the organization. He was a man of long and successful business experience. He was able to earn and did earn from \$40,000 to \$100,000 in a few months' time from 1906 to 1918 (R. 59). He first went into the saw mill business in 1888. He founded the petitioner corporation in 1924 and became president (R. 56). He turned over to the corporation all the property he owned. In 1924 the saw mill consisted of a small circular saw mill and a home made box factory. The saw mill was improved every season (R. 56). The principal office of the corporation was at Wenatchee (R. 41) where he resided (R. 56). He had charge of converting the corporation's unprofitable orchard tracts into residential tracts (R. 53). He worked night and day, drawing plans, subdividing tracts, making contracts, financing homes, supervising construction, advertising for sale, showing the properties to prospects, and marketing the property (R. 43, 58). He supervised the work of 20 or 30 men. He also handled the selling of lumber and box shooks made at the mill and box factory, in the vicinity of Wenatchee (R. 53). In addition to this, he consulted with his son about formulation and supervision of

policies concerning the operations at Okanogan (R. 43). He would go once or twice a week for this purpose (R. 57). He would help scout the timber, see where they would buy and supervise the cutting (R. 57). He did work in connection with the mill property, the saw mill itself (R. 57). He struggled with the financial arrangements for the real estate and also the saw mill operations (R. 43). At no time was the company able to borrow any money without his individual indorsement (R. 44, 58).

### **3. 1929 Operations**

The business of the petitioner corporation consisted in subdivision development, home construction, logging, lumbering and box making.

The subdivision work at Wenatchee in 1929 included laying out acre tracts, half acre tracts, quarter acre tracts and fifty foot lots, drawing plans, specifications and contracts for building, financing individual houses and supervising purchase of material and construction and painting of houses and cabins (R. 43, 53, 54, 57).

The sales end in the vicinity of Wenatchee of the box shooks and lumber business was conducted in that fruit growing center (R. 53).

The manufacturing and saw mill operations were conducted near Okanogan (R. 53). Scouting timber, buying and cutting depended upon the location (R. 57). The lumber cutting and box making business of the corporation was seasonal, less than eight months out of the year (R. 52).

The salary of \$10,000 and \$3,000 bonus was reasonable for Mr. E. Wagner and Otto H. Wagner for



the year 1929 (R. 46, 49). The work was worth it (R. 59).

The year 1929 was their first big year compared with prior years (R. 45). The subdividing operations near Wenatchee in 1929 constituted an unusual undertaking for the year (R. 43). Much new equipment was installed prior to the 1929 season (R. 61, 62). A double shift was put on at the factory the first week in June. These shifts were ten hour shifts and during the four hours between shifts they would repair machinery (R. 56).

The gross sales of the company jumped from approximately \$20,000 in 1924 to over \$220,000 in 1929, more than ten times (R. 36). The profits were substantial (R. 83).

The number of officers and employees in the administrative and executive ends of the business of other mill operations by competitors in the vicinity, was more than double those kept by petitioner (R. 50, 59). This economy saved the petitioner the expense of paying high salaries to experts.

*Standard Silk Dyeing Co.*, 9 B. T. A. 648, 650.

In *Fox River Iron Co.*, 5 B. T. A. 810, 813, the Board stated:

“When inquiring as to the reasonable compensation for services of a corporation’s officers we may properly consider the duties performed, the responsibilities assumed, and the volume of business handled, and a comparison of these facts in respect of the corporation under inquiry

with like facts respecting other taxpayers similarly circumstanced.”

Mr. E. Wagner could have earned more than \$13,000 in other lines of work (R. 59). He could have gone out in 1929 and made \$40,000 or \$50,000 (R. 59). This compensation for 1929 was really underpay (R. 59).

The results accomplished by the officers and their responsibilities justified the compensation allowed.

In *Union Dry Goods Co.*, 1 B. T. A. 833, 837, the Board stated:

“We think that, measured by the results accomplished, both from the standpoint of volume of business transacted and profits to the corporation arising therefrom, the salaries paid to its officers were not unreasonable or excessive for the services rendered.”

And in *Stilwell Paper Co.*, 6 B. T. A. 531, 535:

“Considering the services rendered, the experience of the officers and other facts, we think that the amounts were reasonable.”

#### 4. *Prior salaries inadequate*

The salaries taken by the Wagners for the years prior to 1929 were inadequate. They were just nominal. They did not compensate them for the work actually performed (R. 51). They drew small salaries of two to four thousand dollars (R. 35) from force of necessity to protect the corporation financially (R. 52, 56 and 60). It was practically impossible during those years for the corporation to borrow money. The officers felt that if they drew salaries such as their work justified, the company would be financially

embarrassed and the operations thus hindered (R. 44, 49, 58).

Several years may be considered in arriving at a true picture of what was actually accomplished by the officers. In *Claude A. Prager*, 10 B. T. A. 22, 25, the Board stated:

“The authorization and payment of compensation in a given year, as and for compensation in that year, may be measured by services performed in a prior year and in the light of circumstances surrounding the payment of compensation already paid in those years. It is also true that the payment of additional salaries in one year may have in them an element looking to future services.”

#### **5. Salary of mill superintendent \$7,200.00**

The time which the superintendent put in would be about one-half of the time put in by either Mr. E. Wagner or Otto H. Wagner (R. 55). The superintendent only worked one shift. His responsibility was limited to taking charge of the actual saw mill operation and seeing that the box factory made proper boxes. He was primarily a box maker. He received \$3,600 salary, \$600 cash bonus, and \$3,000 property bonus, totaling \$7,200 (R. 54, 55). The duties, ability, experience, and responsibilities of Mr. E. Wagner and Otto H. Wagner far exceeded those of the superintendent. They should be allowed pay accordingly.

#### **6. Presumption of reasonableness**

Salaries voted by corporate directors (R. 46, 58) are presumed reasonable and proper.

A contrary view was assumed by the U. S. Board of Tax Appeals in *Ox Fibre Brush Co.* (8 B. T. A. 422, 426):

“In support of its contention that such amount was reasonable compensation for 1920, the petitioner takes the position that the action of the board of directors of a corporation in authorizing salaries for a given year raises a presumption that the amount voted is reasonable and complies with the statute until the contrary be proven. In other words, the petitioner insists that the burden of proof is on the respondent to show that the salaries for 1920 were unreasonable. We are unable to agree with the petitioner in this respect.”

This case was reversed by the Circuit Court in *Ox Fibre Brush Co. v. Blair*, 32 F. (2d) 42, 45, 7 A. F. T. R. 8673 (affirmed 50 S. Ct. 273, 74 L. Ed. 733, 8 A. F. T. R. 10901), stating:

“Turning to the Board of Tax Appeals’ second conclusion, we are likewise forced to declare that to be erroneous. The action of the board of directors of a corporation in voting salaries for any given period is entitled to the presumption that such salaries are reasonable and proper . . . The prima facie presumption in favor of the action which a corporation has taken in cases of this kind has repeatedly been recognized by the Board of Tax Appeals itself. For example, see *Collins-McCarthy Candy Co. v. Commissioner*, 4 B. T. A. 1280; *Standard Silk Dyeing Co. v. Commissioner*, 9 B. T. A. 648. This presumption

is in no wise inconsistent with the principle that the burden of proof rests upon the taxpayer."

In *Toledo Grain & Milling Co. v. Commissioner*, 62 F. (2d) 171, 172, 11 A. F. T. R. 1073, the court reversing the Board stated:

"The resolution of the Board of Directors of April 4, 1919, creates the inference that the salary allowances were reasonable."

In *Collins-McCarthy Candy Co.*, 4 B. T. A. 1280, 1284, the Board of Tax Appeals stated:

"We are content to rest our decision on this point upon the proposition that the action of the board of directors of a corporation in authorizing salaries for a given year is entitled to the presumption of correctness unless the contrary be proven, and, such not having been done in this case, the action of the board of directors must stand."

In *Vaughan & Barnes, Inc.*, 6 B. T. A. 1279, 1285, the Board of Tax Appeals stated:

"We should be very cautious in substituting our judgment as to the reasonableness of salaries for that of the corporation itself."

In *Standard Silk Dyeing Co.*, 9 B. T. A. 648, 651, the Board said:

"We find no evidence in the record that warrants the substitution of the Commissioner's judgment for that of the petitioner's board of directors, even though it be in the matter of authorizing their own salaries."



### 7. Board fixed an arbitrary value for services

The respondent Commissioner determined the salaries at \$3,000 each (R. 66, 83).

“The determination of the Commissioner is prima facie correct and must stand unless overcome by substantial evidence.”

*Nichols v. Commissioner*, 44 F. (2d) 157, 158, 9 A. F. T. R. 285.

The Board was convinced that the determination of the Commissioner was overcome by *substantial evidence*. It raised both salaries.

“The burden then shifted to the Commissioner to support his determination by evidence, and this he did not do nor attempt to do, and accordingly his determination cannot stand.” *Nichols* case, *supra*, p. 159.

The Commissioner offered no evidence. The Board then “should not have disregarded the only positive and direct evidence” introduced as to value. *Boggs & Buhl v. Commissioner*, 34 F. (2d) 859, 861, 8 A. F. T. R. 9631. As in *Nichols v. Commissioner*, *supra*, p. 159:

“The Board of Tax Appeals disregarded all the positive and affirmative evidence in the case. Its own findings are not predicated upon any substantial evidence, and therefore its redetermination is set aside, the determination of the Commissioner reversed, and the income tax return of the petitioner approved.”

The Board could not justly fix an arbitrary or theoretical valuation. However, it attempted to do this,

and this Court is not bound by the findings of the Board.

*Nachod & United States Signal Co. v. Helvering*, 74 F. (2d) 164, 14 A. F. T. R. 819.

In *Foster v. Commissioner*, 57 F. (2d) 516, 518, 10 A. F. T. R. 1570, the Court stated:

“Bound as we are to indulge in favor of findings of the Board upon fact questions, such as value, every reasonable intendment, obligated as we are not to upset them when they are sustained by the evidence (*Phillips v. Comm.*, 283 U. S. 600, 51 S. Ct. 608, 75 L. Ed. 1289), we are not bound by a value the basis of which is arbitrarily or theoretically set down. *The Board may not create*; it must find in the evidence the value which it fixes.”

The value must not be mere “conjecture”.

*Boggs & Buhl v. Commissioner*, 34 F. (2d) 859, 861, 8 A. F. T. R. 9631.

There is no evidence that the Board had any independent and personal knowledge of the business.

*Pittsburgh Hotels Co. v. Commissioner*, 43 F. (2d) 345, 9 A. F. T. R. 83.

However, the Board member who conducted the hearing at Seattle, the Honorable Stephen J. McMahon, did see and hear the men who ran the business, and saw the country in the general vicinity. This member, in his dissenting opinion, concurred in by the Honorable J. Russell Leech, states:

“The record fails to disclose evidence to support a finding of fact or holding that a reason-

able allowance as compensation for services rendered by the Wagners for the year 1929 is less than \$13,000 each. The witnesses for petitioner were intelligent candid and in all respects credible; their testimony was not impeached; and no countervailing evidence was offered by respondent." (R. 20)

"Decision of question of fact by Board of Tax Appeals is not binding on appeal where only the dissenting member was present when testimony was taken." Syllabus *Jewett & Co. v. Commissioner*, 61 F. (2d) 471, 11 A. F. T. R. 958.

"The function of the Court is to decide whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made." *Helvering v. Rankin*, 295 U. S. 123, 55 S. Ct. 732, 15 A. F. T. R. 1076.

There is no evidence to support a finding that a sum less than \$13,000 is reasonable compensation (R. 14). The majority of the Board disregarded uncontroverted and unimpeached testimony.

In *Dempster Mill Mfg. Co. v. Burnet*, 46 F. (2d) 604, 606, 9 A. F. T. R. 797, 799, the Court, reversing the Board, said:

"It was his testimony that was rejected as being the testimony of an interested witness. We think it was error to disregard the testimony of this witness, inasmuch as it stands uncontradicted."



In *Planters' Operating Co. v. Commissioner*, 55 F. (2d) 583, 585, 10 A. F. T. R. 1130, the Court, reversing the Board, stated:

“(3) That it is reversible error for the Board of Tax Appeals to disregard competent relevant testimony when it is not contradicted.”

*Heywood Boot & Shoe Co. v. Commissioner*,  
76 F. (2d) 586, 15 A. F. T. R. 1192;

*Blackmer v. Commissioner*, 70 F. (2d) 255,  
13 A. F. T. R. 957;

*Bonwit Teller & Co. v. Commissioner*, 53 F.  
(2d) 381, 10 A. F. T. R. 656.

## **B. Interest on Loans, Advances, and Undrawn Salaries Deductible**

### **Assignments of Error:**

(5) The finding that petitioner is not entitled to the deduction of \$2,906.22 (corrected amount instead of \$2,750.00) interest at 10% (the contract rate) paid on loans and undrawn salaries for 1929, is unsupported by any evidence (R. 32).

(6) The finding that petitioner is not entitled to a deduction of at least \$1,743.73 interest at 6% (the statutory rate in the State of Washington) on loans and undrawn salaries for 1929, is unsupported by any evidence (R. 32).

(7) The findings of fact are not supported by the evidence (R. 32).

(8) The findings of fact are contrary to the evidence (R. 32).

(14) The failure to allow as a deduction from

the petitioner's gross income for the year 1929 the sum of \$2,906.22 (corrected amount instead of \$2,750.00) interest at 10% (the contract rate) paid on loans to the petitioner by its officers and on unpaid balances left with the company during the year (R. 33).

(15) The failure to allow as a deduction from the petitioner's gross income for the year 1929 at least the sum of \$1,743.73 interest at 6% (the statutory rate in the State of Washington) on loans to the petitioner by its officers and on unpaid balances left with the company during the year (R. 33, 34).

***1. The Board did not make findings necessary to its conclusions***

The Board did not make findings necessary to its conclusions.

*Kendrick v. Commissioner*, 29 F. (2d) 559,  
7 A. F. T. R. 8336.

Exhibits 6 and 7 show balances left with the corporation by Mr. E. Wagner and Otto H. Wagner on January 1, 1929, at \$5,432.57 and \$16,096.57, respectively. The *findings* of the majority of the Board state:

"E. Wagner and Otto H. Wagner made loans to the petitioner prior to and during 1929, and, in addition to those loans, they left with the petitioner parts of their salaries for years prior to 1929. Interest for the year 1929 on those amounts computed at the rate of 6 per cent, amounts to \$1,228.69." (R. 14)

This excludes interest on 1929 salaries and bonus.

In the majority *opinion* we find these words:

“The petitioner has failed to prove that it is entitled to any larger deduction for interest than the amount allowed by the Commissioner.” (R. 17)

This excludes all interest payable to the Wagners for 1929.

There is no finding nor evidence to support the conclusion of no interest allowable.

The policy of the Wagners was to draw only a sufficient salary to live on (R. 53, 49). The balance of the undrawn salary was left with the company so that the operations could be financed (R. 49, 52, 53). Sufficient loans could not be made from outside sources (R. 62). The maximum credit was \$15,000 (R. 53, 58). Interest on these loans was allowed by the Commissioner in the sum of \$2,009.53 out of the \$4,759.53 claimed (R. 100). He rejected an item of \$2,750.00 (R. 63, 65, 66) which was “interest accrued on loans from officers” (R. 98), which item was corrected in evidence (R. 38, 39, 40, 41, 101, 102) to \$1,743.73 (at 6%) and proven as interest due at six per cent on the undrawn salary of Mr. E. Wagner, for the year 1929 (R. 39) and “the interest on advances and undrawn salaries of Mr. Otto H. Wagner” (R. 40). Respondent’s attorney admitted it was the correct computation of this interest item, but contended that no interest was payable in the absence of an express agreement (R. 39).

These items of advances and undrawn salaries (R. 101, 102) drew interest from the time they became payable. On January 1, 1929, there was payable to

Mr. E. Wagner \$5,432.57 (R. 101) and to Mr. Otto H. Wagner \$16,096.57 (R. 102). Interest accrued on these balances from January 1, 1929.

## 2. *The calculation and allowance of interest*

The calculation of interest in the tax return was erroneous. This was corrected at the hearing and the admitted evidence shows the following to be correct:

Interest due E. Wagner in 1929 @ 6%	
Exhibit 6 (R. 101).....	\$ 404.89
Interest due Otto H. Wagner in 1929 @	
6%, Exhibit 7 (R. 102).....	1,338.84
Total at 6%.....	<u>\$1,743.73</u>

The interest contended for was 10%, totaling \$2,906.22 (R. 101, 102). The interest rate paid to banks was 8% and 10% (R. 61, 49). The Wagners agreed upon this rate (R. 61). However, at least 6% should be allowed.

The books and Exhibits 6 and 7 show the balances, salary of each payable the first of each month, and the bonus payable October 1, 1929 (R. 101, 102, 39).

The statutes of the State of Washington provide:

“Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of six per centum per annum where no different rate is agreed to in writing between the parties.”  
Sec. 7299, Rem. Rev. Stat. of Wash.

Consequently interest accrued as set forth in the books and Exhibits 6 and 7.

“Statutes \* \* \* should be construed liberally in favor of the taxpayer.”

- Dempster Mill Mfg. Co. v. Burnet*, 46 F. (2d) 604, 606, 9 A. F. T. R. 797, 799.  
*Pioneer Pole & Shaft Co. v. Commissioner*, 55 F. (2d) 861, 10 A. F. T. R. 1198.  
*Gould v. Gould*, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211, 3 A. F. T. R. 2958.

### C. Computation of Tax and Refund

#### Assignments of Error:

(7) The findings of fact are not supported by the evidence (R. 32).

(8) The findings of fact are contrary to the evidence (R. 32).

(16) The finding of a deficiency for the year 1929 instead of the determination that there is no deficiency in income tax for the said year (R. 34).

#### 1. *The computation of the tax by the Board of Tax Appeals*

Net income as determined by Commissioner R. 67) .....	\$32,792.24
Less additional compensation approved by Board (R. 14).....	8,000.00
	<hr/>
	\$24,792.24
Less credit against net income less than \$25,000 (Sec. 26, Revenue Act of 1928) .....	3,000.00
	<hr/>
Balance subject to tax.....	\$21,792.24
Income tax at 11%.....	2,397.15
Tax assessed and previously paid (R. 83) .....	1,063.71
	<hr/>
Deficiency determined by Board (R. 28) .....	\$ 1,333.44



## 2. *Petitioner's computation of tax and overpayment*

Petitioner made an overpayment of income tax of \$178.37 as set forth in the following calculation:

Net income as determined by Commissioner (R. 67).....	\$32,792.24
Less additional compensation approved by Board (R. 14).....	8,000.00
Net income as determined by Board....	\$24,792.24
Additional deductions claimed by petitioner:	
Additional salary.....	\$12,000.00
Interest @ 6% on loans, advances and un-drawn salaries .....	1,743.73
	<u>13,743.73</u>
Net income, as claimed by petitioner....	\$11,048.51
Less credit against net income less than \$25,000 (Sec. 26, Revenue Act of 1928).....	3,000.00
Balance subject to tax.....	\$ 8,048.51
Income tax at 11%.....	885.34
Previously paid (R. 83).....	1,063.71
Overpayment .....	178.37

In case 10% is allowed on loans, advances and un-drawn salaries, the payment refundable would be in the sum of \$306.25.

### CONCLUSION

We submit that the Board of Tax Appeals erred in refusing to allow the Wagners \$13,000 each for compensation. The testimony is clear and uncontradicted that the allowance is reasonable, that it was authorized by the trustees during the year and that it was paid by the corporation or credited on the books during the year. The Wagners did a tremendous amount of work, including work normally done by additional employed executives. The responsibilities involved and the results accomplished warrant the allowance of the compensation claimed as a deduction.

The Board was satisfied that the Commissioner's allowance of \$3,000 salary was too low. The Board could only decide upon another figure indicated by the evidence. All the evidence, opinion and factual, conclusively indicated \$13,000.

The interest item was submitted to the Board on the question whether or not any interest was allowable without a resolution of the trustees. The correct calculation and the fact that it was the item disallowed was recognized and agreed to by all parties. The interest figures were taken from the books, the amounts were corrected at the trial, the statutes of the State of Washington provide for interest in such cases, and we submit that the corrected amounts should be allowed.

We finally submit that the Board arbitrarily disregarded the undisputed, uncontradicted and unimpeached testimony offered by the petitioner and arrived at conclusions which have no evidence to support them. Petitioner is entitled to the deductions

of \$13,000 each for Mr. E. Wagner and Otto H. Wagner, representing compensation paid, and the interest item of \$1,743.73. Properly there is no deficiency; petitioner has made an overpayment of \$178.37.

Respectfully submitted,

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